

G R A N D C A N Y O N T R U S T

August 16, 2013

Sent Via Electronic Mail – Receipt Reply Requested

Vicki Ferguson, FOIA Coordinator
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Email: ferguson.vicki@epa.gov

RE: FREEDOM OF INFORMATION ACT REQUEST

Dear Ms. Ferguson,

Grand Canyon Trust (“Trust”) is a non-profit corporation registered in the State of Arizona and is certified under 501(c)(3) of the Internal Revenue Tax Code. Our mission is to protect and restore the Colorado Plateau – its spectacular landscapes, flowing rivers, clean air, diversity of plants and animals, and areas of beauty and solitude.

This is a request under the Freedom of Information Act (“FOIA”). 5 U.S.C. § 552, *et. seq.* The Trust requests copies of documents and records from the U.S. Environmental Protection Agency (“EPA” or “Agency”) related to the White Mesa Uranium Mill, which is located near Blanding, Utah and currently operated by Energy Fuels Inc. This request concerns the White Mesa Uranium Mill’s compliance NESHAP Part 61 Subpart W- National Emission Standards for Radon Emissions from Operating Mill Tailings.

Requested documents and records:

- Item 1: All documents and records, including any communication with the Utah Division of Radiation Control or the Utah Division of Air Quality, related to radon-222 emissions from the White Mesa Uranium Mill’s Cell #2 from January 2012 to present.
- Item 2: All documents and records, including any communication with the Utah Division of Radiation Control or the Utah Division of Air Quality, related to the number of tailings impoundments in operation at the White Mesa Uranium Mill, and the White Mesa Uranium Mill’s compliance with the work practice standards for number of impoundments established in 40 C.F.R. § 61.252 (b)(1).

The terms “documents and records” in this request includes all forms of written or recorded matter, including correspondence, memoranda, records, e-mail, data sheets, tabulations, reports, evaluations, summaries, opinions, journals, calendars, statistical records, notes, transcriptions, telegrams, teletypes, telex messages, telefaxes, recordings of telephone calls, and other communications, including but not limited to, notes, notations, memoranda and other writings of or relating to telephone conversations and

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conferences, minutes and notes of transcription of all meetings and other communications of any type, microfiche, microfilms, dictabelts, tapes or other records, logs and any other information that is stored or carried electronically, by means of electronic equipment or otherwise, and that can be retrieved in printed, graphic, or audio form, including, but not limited to, information stored in the memory of a computer device, data stored on removable magnetic or optical media, e-mail, data used for electronic interchange, audit trails, digitized pictures and audio (for example, data stored in MPEG, JPEG, and GIF), digitized audio, and voice mail. In addition, the term “e-mail” refers to the exchange of text messages and computer files over a communication network, such as a local area network, intranet, extranet, or public network like the Internet or other online service provider.

In accordance with the FOIA, if portions of a document are exempt from release, the remainder must be segregated and disclosed. Therefore, please make available all non-exempt portions of the records requested and please justify any deletions by reference to specific exemptions in the FOIA. Pursuant to the FOIA, we anticipate the receipt of written correspondence from the Agency within twenty (20) days of your receipt of this request, indicating when we can expect to receive the requested documents.

Finally, the FOIA provides that documents shall be provided without any charge or at a reduced cost if disclosure furthers the public interest rather than the commercial interest of the requester. 5 U.S.C. § 552 (a)(4)(A)(iii). To the best of our knowledge, the majority of the information requested is not available from any other federal, state, or local agency. The release of this information will not result in any direct financial benefit to the Trust, or any other individuals or organizations. In addition, the FOIA clearly indicates that the Congress did not intend fees to present a barrier to public interest organizations seeking access to government records. Therefore, we request a fee waiver for all search and duplication fees pursuant to the Agency’s authority under the FOIA and its implementing regulations. *See* 55 U.S.C. Sec. 552 (a)(4)(A).

REQUEST FOR FEE WAIVER

The Trust requests that you waive all fees in connection with this matter. As shown below, the Trust meets the two-pronged test under FOIA for a fee waiver, 5 U.S.C. § 552(a)(4)(A)(iii). In particular, the Trust has demonstrated that the disclosure of this information will significantly contribute to public understanding of the operations or activities of the government.

In considering whether the Trust meets the fee-waiver criteria, it is imperative that the EPA remember that FOIA carries a presumption of disclosure and was designed specifically to allow non-profit, public interest groups such as the Trust access to government documents without the payment of fees. As stated by one Senator, “[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . .” 132 Cong. Rec. S. 14298 (statement of Sen. Leahy). In interpreting this amendment, the Ninth Circuit has stated that the amended statute “is to be liberally construed in favor of waivers for noncommercial requesters.” McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282, 1284 (9th Cir. 1987) (citing Sen. Leahy). The Ninth Circuit has likewise explicitly pointed out that the amendment’s main purpose was “to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA.” *Id.*

Thus, both Congress and the courts are clear in their interpretation that the main legislative purpose of the amendments is to facilitate access to agency records by “watchdog” organizations, such as environmental groups, which use FOIA to monitor and challenge government activities. As a District of Columbia

Circuit Court has stated, this waiver provision was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters and requests,” in clear reference to requests from journalists, scholars, and, most importantly for our purposes, non-profit public interest groups. Better Gov’t Ass’n v. Department of State, 780 F.2d 86, 93-94 (D.C. Cir. 1986), quoting Ettlinger v. FBI, 596 F. Supp. 867, 876 (D. Mass. 1984) (emphasis added).

The subject of the requested records concerns “the operations or activities of the government.”

The subject matter of this request relates to the direct and indirect impacts of radon 222 emissions from the White Mesa Mill on the health of the public and the environment. Management and oversight of the White Mesa Mill’s compliance with NESHAP Subpart W are specific and identifiable activities of the government, in this case, the EPA. See Judicial Watch, 326 F.3d at 1313 (“[R]easonable specificity’ is ‘all that FOIA requires’ with regard to this factor.”) (internal quotations omitted).

The disclosure is “likely to contribute” to an understanding of government operations or activities (the informative value of the information to be disclosed).

The requested documents will provide important information regarding what knowledge the agency has regarding the direct and indirect impacts of Radon 222 emissions from the White Mesa Mill, and compliance with federal laws, specifically the Clean Air Act (CAA). Such knowledge will allow better understanding of government operations, in particular, what the agency knows, and what the agency could be doing, to protect public health and the environment from Radon 222 emissions.

The disclosure of the requested information will contribute to “public understanding.”

The information requested will help provide the Trust with insight into the level of compliance with federal laws currently observed by the EPA in its efforts to regulate Radon 222 emissions from the White Mesa Mill. These documents are not all currently in the public domain. Their release is not only “likely to contribute,” but is in fact certain to contribute to better public understanding of legal and policy issues related to radon 222 emissions from the White Mesa mill. The public is always well served when it knows how government activities, particularly matters touching on legal and ethical questions, have been conducted. See Judicial Watch, 326 F.3d at 1314 (“[T]he American people have as much interest in knowing that key [agency] decisions are free from the taint of conflict of interest as they have in discovering that they are not.”).

In McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d at 1286, the court made clear that “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations....” In this instance, all the requested documents potentially provide new information about radon 222 emissions from the White Mesa Mill, and that facility’s compliance with federal law. Moreover, the information will provide important oversight of EPA management by revealing what information the agencies has about adherence to the requirements of federal laws, specifically the Clean Air Act, by the operators of the White Mesa Mill. See Western Watersheds Project v. Brown, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“WWP asserted in its initial request that the information requested was either not readily available or never provided to the public, facts never contradicted by the BLM. Therefore, the Court finds that WWP adequately demonstrated that the information would contribute significantly to public understanding.”); see also Community Legal Services v. HUD, 405 F.Supp.2d 553 (D. Pa. 2005) (“[T]he CLS request would likely shed light on information that is new to

the interested public.”). Finally, this request will also shed light on whether the agency is appropriately implementing environmental laws and regulations.

Public understanding of the new information will be achieved because the Trust intends to take the new information that it receives and to educate the public about it such as informing the public about legal and policy issues related to radon 222 emissions from the White Mesa Mill. The Trust will inform the public about what the Agency could be doing in light of the known information.

In determining whether the disclosure of requested information will contribute to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994). The Trust need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity.” Judicial Watch, 326 F.3d at 1314. It is sufficient for the Trust to show how it distributes information to the public generally. Id.

The Trust is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Trust has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Trust’s fee-waivers, agencies have recognized that the Trust possesses the expertise to explain the requested information to the public and the Trust possesses the ability to disseminate the requested information to the public (e.g. the Trust has several staff scientists, policy analysts, and staff attorneys who have the ability to assess and digest the requested information, and the Trust has the capacity to publish reports regarding that information). The Trust’s informational publications supply information not only to its membership, but also to the memberships of several other conservation organizations, regionally as well as nationally. In addition, our informational publications are disseminated to the media and are available on our website to the general public. Also, information such as that presently requested is often disseminated through our e-mail alerts, which are sent to nearly 8,500 people approximately once a week, and our web page, which is accessed nearly 6,000 times each month. Information concerning uranium processing in Utah will likely be disseminated through all of these means. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005) (“Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public's understanding of the BLM's operations and activities.”).

The disclosure is likely to contribute significantly to public understanding of government operations or activities.

Public oversight and enhanced understanding of EPA’s duties is absolutely necessary. The Trust’s track record of active participation in oversight of governmental agency activities and its consistent contribution to the public’s understanding of agency activities as compared to the level of public understanding prior to disclosure are well established. In determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject. Carney v U.S. Dept. of Justice, 19 F.3d 807 (2nd Cir. 1994). The Trust need not show how it intends to distribute the information, because “[n]othing in FOIA, the [agency] regulation, or our case law require[s]

such pointless specificity.” Judicial Watch, 326 F.3d at 1314. It is sufficient for the Trust to show how it distributes information to the public generally. Id.

The requested information is certain to shed light on how the EPA is regulating uranium milling in Utah and whether the EPA is complying with applicable law. The documents requested will also help the Trust determine if and how uranium milling, specifically the emissions of Radon 222 from the White Mesa Mill, is impacting water, wildlife, soil, air and human health. Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. The Trust intends to fulfill its well established function of public oversight of agency action. The Trust is not requesting these documents merely for their intrinsic informational value.

The Trust is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Trust has been substantially involved in the management activities of numerous government agencies for years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Trust’s fee-waivers, agencies have recognized that (1) the Trust’s requested information contributes significantly to the public understanding of the operations or activities of the government, (2) the Trust’s requested information enhances the public’s understanding to a greater degree than currently exists, (3) the Trust possesses the expertise to explain the requested information to the public (e.g. the Trust has several staff scientists, policy analysts and staff attorneys), (4) the Trust possesses the ability to disseminate the requested information to the general public, (5) and that the news media recognizes that the Trust is an established expert in the regional environmental issues impacting the Colorado Plateau.

Concurrent with any action that the Trust may take after obtaining the requested documents, the Trust will publicize the reasons for the action and the underlying actions of the agencies that have prompted the action. This is certain to result in a significant increase in public understanding of government agency activity. The Trust has enforced or publicized agency compliance with the provisions of various environmental laws many times through information gained from FOIA requests like this one, and has also many times publicized the status of conservation measures being taken on their behalf through information gained from FOIAs like this one. The Trust intends to use the documents requested in this request in a similar manner. In addition, our informational publications supply information not only to our membership, but also to the memberships of most other conservation organizations, locally as well as nationally. Our informational publications continue to contribute information to public media outlets, as well. For example, information such as that presently requested is often disseminated through our e-mail alerts, which is sent to nearly 8,500 people approximately once a week, and our web page, which is accessed nearly 6,000 times each month. Information concerning the EPA’s oversight of uranium milling in Utah, will likely be disseminated through all of these means. See Forest Guardians v. DOI, 416 F.3d 1173, 1180 (10th Cir. 2005) (“Among other things, Forest Guardians publishes an online newsletter, which is e-mailed to more than 2,500 people and stated that it intends to establish an interactive grazing web site with the information obtained from the BLM. By demonstrating that the records are meaningfully informative to the general public and how it will disseminate such information, Forest Guardians has shown that the requested information is likely to contribute to the public’s understanding of the BLM’s operations and activities.”).

Obtaining the information is of no commercial interest to the Trust.

Access to government documents and similar materials through FOIA requests is essential to the Trust's role of educating the general public. The Trust – a non-profit – has no commercial interest and will realize no commercial benefit from the release of the requested information.

We fully expect that a fee waiver will be granted, as it has been in the past and because the requirements for a waiver have been satisfied. Should you decide not to waive fees, however, we request that you contact us prior to incurring any costs in excess of \$25. Please feel free to request additional information concerning our fee waiver request if you believe it is needed to make a final decision.

We look forward to your reply. If you are not able to provide the requested documents or grant the fee waiver, please immediately notify Anne Mariah Tapp at (928) 774-7488 or atapp@grandcanyontrust.org.

We request that the requested documents be provided in electronic format (e.g. via CD or DVD, by email, or posted on the agency website). All CDs or DVDs and/or hard copies should be mailed to the following address

Grand Canyon Trust
2601 N. Fort Valley Rd.
Flagstaff, AZ 86001
(928) 774-7488

Thank you for your time and cooperation.

Sincerely,

/s/ Anne Mariah Tapp